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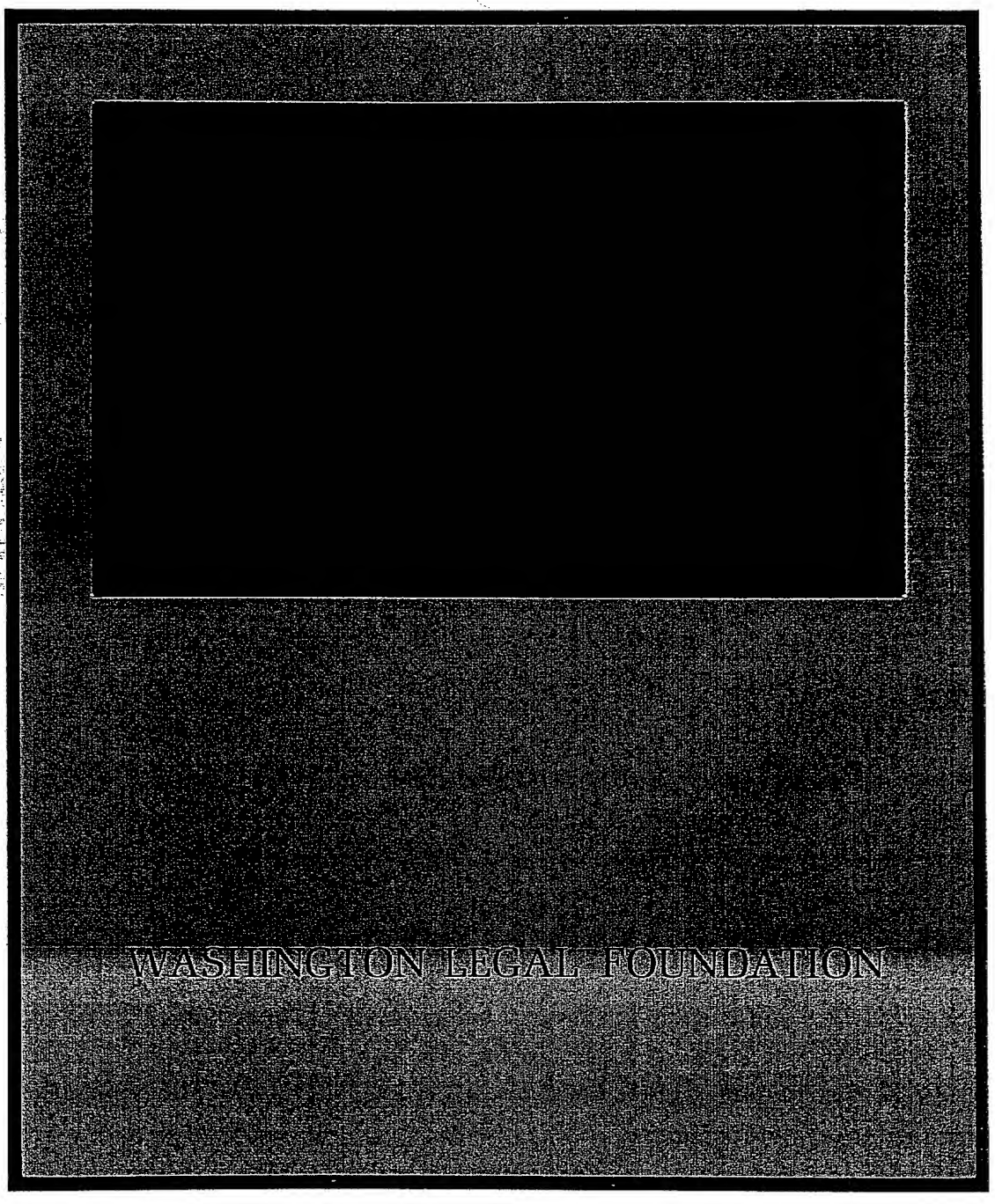

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THE PRESIDENT'S POWER TO APPOINT FEDERAL JUDGES: A POPULAR CHECK ON COURT USURPATIONS.

by

Bruce E. Fein

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Bruce Fein formerly served as Associate Deputy Attorney General of the United States and as General Counsel of the Federal Communications Commission. He is currently Senior Vice President and Director of Telecommunications at Gray and Company, an Adjunct Scholar at the American Enterprise Institute and the Heritage Foundation, and Supreme Court Editor of Benchmark magazine.

The President's Power to Appoint Federal Judges: A Popular Check on Court Usurpations.

Justice Felix Frankfurter noted in McNabb v. United States that the history of liberty has largely been the history of observance of procedural safeguards.[1] Chief Justice John Marshall explained in Marbury v. Madison that an essential purpose of a written Constitution is to limit the powers of government;[2] the United States Constitution achieves this goal by delineating the powers and responsibilities of the Congress, the Executive, and the Judiciary in language to be interpreted in accord with the intent of the constitutional framers. As Marshall elaborated in Gibbons v. Ogden:[3] "[T]he enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. . . . [W]e know of no rules for construing [the Constitution] other than is given by the language of the instrument . . . taken in connection with the purpose for which [federal powers] were conferred."

To depart from the intent of the Founding Fathers in constitutional interpretation endangers the restraints on government power that a written Constitution is designed to impose. James Madison instructed that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers."[4] Thomas Jefferson further elaborated the hazards of

infidelity to constitutional intent:

> "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. . . . Let us go then perfecting it, by adding, by way of amendment to the Constitution, those powers which time and trial show are still wanting."[5]

Chief Justice Taney remonstrated against any departure from the intent of the framers in constitutional adjudication: "If in this Court we are at liberty to give the old words new meanings when we find them in the Constitution, there is no power which may not by this mode of construction be conferred on the general government and denied to the states."[6] In 1872, the Senators who had voted in favor of the Fourteenth Amendment signed a unanimous Judiciary Committee Report which admonished: "A construction which should give the phrase . . . a meaning different from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution."[7] Justice Harlan protested that "when the court disregards the express intent and understanding of the framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which is its highest duty to protect."[8]

Constitutional language or history is not invariably unambiguous. Thus, the interpretation of the Constitution by federal judges informed by an intent standard still leaves room for modest discretion or policy

choices. But such circumscribed discretion or policymaking is generally inconsequential.

In Federalist No. 78, Hamilton characterized the federal judiciary as the least dangerous branch because of the nature of its functions. This classic characterization is apt if — and only if — federal judges execute their interpretive powers as the Constitution envisioned. As Hamilton further explained in Federalist No. 78, the judiciary is obliged to employ constitutional intent in reviewing the validity of legislation. He understood that "[t]o avoid an arbitrary discretion in the courts, it is indispensible that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[9] The little time or debate devoted to the powers of the federal judiciary at the Constitutional Convention fortifies the conclusion that expansive authority was not intended.[10]

When there is an intellectual consensus that federal judges must confine their constitutional rulings to expounding the intent of the Framers, the need for strict scrutiny by a President of the legal philosophies of judicial candidates is not urgent. In such a climate, a President enjoys the luxury of searching for nominees with the celestial attributes extolled by Judge Learned Hand and Justice Frankfurter. The former maintained:

> "I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have a bowing acquaintance

> with Acton and Maitland, with Thucydides, Gibbon, and Carlyle, with Homer, Dante, Shakespeare, and Milton, with Machiavelli, Montaigne, and Rabelais, with Plato, Bacon, Hume, and Kant as with books that have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly everything he will."[11]

Frankfurter rhapsodized that a Supreme Court jurist should combine the talents of philosopher, historian, and prophet. A Justice, he asserted, should "pierce the curtain of the future . . . give shape and visage to mysteries still in the womb of time. . . . [the job thus demands] antennae registering feeling and judgment beyond logical, let alone quantitative proof. . . ."[12]

The annals of the federal judiciary, however, demonstrate that earthbound judges are inclined to smuggle their personal conceptions of ethics, morality, justice, or enlightened public policy into the process of constitutional interpretation. Occasionally, the smuggling is overt. Justice Field insisted on authority to invalidate statutes that affronted his concept of justice in Knox v. Lee:

> "For acts of flagrant injustice . . . there is no authority in any legislative body, even though not restrained by any express constitutional prohibition. For as there are unchangeable principles of right and morality, without which society would be impossible, and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice, upon the existence of which all constitutional government would be an intolerable and hateful tyranny."[13]

And Chief Justice Earl Warren routinely employed his personal sense of ethics or fairness to support revolutionary constitutional decrees regarding criminal law, electoral apportionment, standing, and political questions.[14]

More often, the smuggling is covert. In Dred Scott v. Sanford,[15] the Court's sympathy towards slaveholders guided the decision that nullified Congressional power to prohibit slavery in the territories and that denied blacks U.S. citizenship. The dissent of Justice Curtis cogently demonstrated that these twin conclusions conflicted with the intent of the constitutional framers. In Pollock v. Farmers' Loan & Trust Co.,[16] and Lochner v. New York,[17] the Court's antagonism toward socialism and hostility toward legislative intervention in the marketplace occasioned rulings holding unconstitutional an income tax on property (but valid as to wages) and a limitation on the weekly hours of bakers. In Everson v. Board of Education,[18] the Court's belief that a strict separation of Church and State was wise public policy precipitated a pronouncement that the due process clause of the Fourteenth Amendment prohibits state laws respecting an establishment of religion. But history discredits the idea that the architects of the Fourteenth Amendment intended such a prohibition.[19] For instance, in 1875 Senator Blaine proposed a constitutional amendment that would deny states the authority to enact laws respecting an establishment of religion, but the amendment failed.[20] And in Roe v. Wade,[21] the Court created a broad constitutional right to abortion under the due process clause of

the Fourteenth Amendment because of its conception of wise public policy. No evidence was assembled to show that such abortion rights accord with the intent of the clause. In contrast, Justice Blackmun, found pertinent to the constitutional issue Ancient attitudes, the Hippocratic Oath, the common law, the English statutory law, the American law, the position of the American Medical Association, the position of the American Public Health Association, and the position of the American Bar Association.

To depart from constitutional intent invariably injects the policy preferences of the Justices into the task of interpretation. The fundamental illegitimacy of such judicial usurpations of policymaking is frequently obscured by debating whether the substantive results are acceptable — in short, whether the ends justify the means. Thus, columnist Anthony Lewis described Chief Justice Earl Warren as "the closest thing the United States had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen as the good of society. Fortunately, he was a decent, humane, honorable, democratic Guardian."[22] Whether such a glowing depiction of Warren is justified is problematic. In any event, Lewis profoundly erred in suggesting that illegitimate judicial policymaking praticed by a virtuous Justice is tolerable.

The Constitution was not designed on the assumption that angels would occupy government offices. As James Madison noted in Federalist No. 51, if men were angels no government would be necessary. The

Founding Fathers assumed unchecked power would be abused; a constitutional system of separated powers and checks and balances was erected to forestall government abuses. One of the checks on judicial usurpation of policymaking was the obligation to interpret the Constitution in accord with the intent of its authors. Otherwise, as Jefferson, Madison, and others have understood, the judiciary could readily arrogate or misuse power through creative, inventive, or idiosyncratic constructions of constitutional provisions. The history of the Supreme Court confirms that understanding.

a century ago that DeTocqueville observed over a century ago that "Americans have the strange custom of seeking to settle any political or social problem by a lawsuit instead of using the political process as do people in most other countries."[23] As a consequence, the Supreme Court has recurring opportunities to scuttle the political programs of the elected branches of government at the federal, state, and local levels challenged on constitutional grounds. Justices who employ personal standards of ethics, fairness, or justice to make constitutional judgments vote to invalidate policies they deplore.

Thus, in a 1937 broadcast address, President Franklin Roosevelt recounted his frustration with a Supreme Court dominated by such policymaking Justices. Roosevelt's unmuffled criticism of the Court

is quoted at length because it enlightens understanding of controversy over President Reagan's judicial appointments:

> In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policymaking body.
>
> When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these Acts of the Congress — and to approve or disapprove the public policy written into these laws.
>
> That is not only my accusation. It is the accusation of most distinguished Justices of the present Supreme Court. I have not the time to quote to you all the language used by dissenting Justices in many of these cases. But in the case holding the Railroad Retirement Act unconstitutional, for instance, Chief Justice Hughes said in a dissenting opinion that the majority opinion was "a departure from sound principles," and placed "an unwarranted limitation upon the commerce clause." And three other Justices agreed with him.
>
> In the case holding the A.A.A. unconstitutional, Justice Stone said of the majority opinion that it was a "tortured construction of the Constitution." And two other Justices agreed with him.

In the case holding the New York Minimum Wage Law Unconstitutional, Justice Stone said that the majority were actually reading into the Constitution their own "personal economic predilections," and that if the legislative power is not left free to choose the methods of solving the problems of poverty subsistence and health of large numbers in the community, then "government is to be rendered impotent." And two other Justices agreed with him.

In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people.

In the face of such dissenting opinions, it is perfectly clear, that as Chief Justice Hughes has said: "We are under a Constitution but the Constitution is what the Judges say it is."

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress — a super-legislature, as one of the Justices has called it — reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution — not over it. In our Courts we want a government of laws and not of men.

I want — as all Americans want — an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written — that will refuse to amend the Constitution by the arbitrary exercise of judicial power — amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.[24]

* * * *

The abuse of judicial power resulting from disobedience to the intent standard of constitutional interpretation has, unfortunately, been the rule rather than the exception in the behavior of the Supreme Court. As a consequence, the people's right to govern themselves through elected representatives has been repeatedly thwarted. The infamous Dred Scott decision denying Congressional power to outlaw slavery in United States territories overrode decades of legislative compromise, culminating in the Kansas-Nebraska Act of 1854.[25] During almost half a century (1890-1936), the Supreme Court frequently invalidated social or economic regulatory policies championed by Progressives or New Dealers because a majority of Justices believed government intervention in free markets was misguided or pernicious.[26] The victims of the Court's interdictions included women,[27] children,[28] and labor.[29] Federal judges fought tenaciously against President Franklin Roosevelt's New Deal initiatives by unleashing over 1600 injunctions against their implementation.[30]

During Chief Justice Warren's reign in office (1954-1969), the High Court fashioned a comprehensive code of criminal and electoral laws to supplant the policies approved by representatives of the people.[31] Equally comprehensive codes regulating government aid to religion[32] and abortion[33] have been decreed by the Court captained by Chief Justice Burger (1969-1985) because of the Court's infidelity to the intent standard of constitutional adjudication.

In the landmark Roe v. Wade[34] decision pronouncing broad abortion rights under the Fourteenth Amendment, for instance, Justice Blackmun was unable to justify the controversial ruling by reference to the intent of the Amendment's authors.

Accordingly, a President who fails to scrutinize the legal philosophy of federal judicial nominees courts frustration of his own policy agenda. President Eisenhower's careless appointments of Chief Justice Earl Warren and Justice William Brennan midwifed decisions that caused him deep remorse.[35] President Reagan's policies regarding the exclusionary rule, the death penalty, drug trafficking, organized crime, abortion, prayer in school, tuition tax credits, federalism, illegal aliens, mandatory busing, and racial quotas or preferences are all likewise vulnerable to judicial repudiation. It is thus imperative that President Reagan scrupulously examine the philosophies of his nominees to vindicate many of the pledges he made to the American people in 1980 and 1984.

A President who insists that his judicial nominees espouse a particular legal philosophy genuinely vindicates the constitutional scheme of checks and balances and a separation of powers. As Madison explained in Federalist No. 47, separation of powers doctrine envisions that each branch of government will exert partial, but not complete, control over the acts of another branch. Madison identified the power the Executive to appoint judges, but not to administer justice directly,

as exemplary of the Constitution's partial commingling of authority.

The President's power to appoint is one mechanism for curbing judicial excesses stemming from disloyalty to the intent standard for constitutional interpretation. Placing that power in perspective, it should be recalled that far more confrontational actions by the elected branches of government have been employed to restrain perceived judicial misconduct or usurpations: impeachment,[36] abolition of judgeships,[37] suspending a term of the Supreme Court,[38] regulating the appellate jurisdiction of the Court,[39] and Presidential defiance of a federal circuit court decree.[40] The appointment process, in contrast, involves no open collision with the judiciary in altering the evolution of jurisprudence.

The Constitution entrusted predominant power at the federal level to Congress and the Executive to achieve twin purposes: to enable the people to govern themselves through elections, and to secure the blessings of liberty. The fundamental principle of our republican government, James Madison noted, is "that the majority who rule in such governments are the safest guardians both of public good and private rights."[41] Justice Holmes voiced similar sentiments, observing that "the legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."[42] And Justice Louis Brandeis noted that the people hold a profound conviction that they "must look to representative assemblies for the protection of their liberties."[43]

History inspires confidence that representative institutions are not predisposed toward tyrannical or bigoted action. Legislatures and executive officials have been as protective of so-called political minorities or civil liberties as have the courts. Illustrative is a constellation of Federal statutes and executive orders issued since 1948:[44] President Truman's desegregation of the Armed Forces,[45] and executive orders of Presidents Kennedy, Johnson, and Nixon ordaining affirmative minority employment efforts by Federal government contractors,[46] the 1957,[47] 1960,[48] and 1964[49] Civil Rights Acts, the Equal Pay Act of 1963,[50] the 1965 Voting Rights Act,[51] as amended,[52] the 1967 Age Discrimination Act,[53] as amended,[54] the 1968 Fair Housing Act,[55] and the Pregnancy Discrimination Act of 1978.[56]

The Leadership Conference on Civil Rights recently applauded legislation[57] enacted by the 98th Congress that established a holiday to celebrate Martin Luther King's Birthday,[58] increased funding for the Legal Services Corporation,[59] and augmented women's and minority rights in the Retirement Equity Act[60] and the Voting Rights for Disabled and Senior Citizens Act.[61]

Whether one believes such enactments are enlightened, they strongly repudiate the idea that representative institutions ordinarily trample or neglect the interests of political minorities. Actions by

representative institutions compare favorably with a sad parade of Supreme Court decisions that have stained the judicial escutcheon. The parade includes decisions holding that blacks are barred from United States citizenship[62] and could be excluded from party primary elections;[63] that Congress cannot proscribe slavery in territories,[64] or racial discrimination in public places,[65] or private acts of violence against black citizens;[66] that segregation of blacks[67] and citizens of Chinese ancestry in public institutions[68] is constitutionally irreproachable; that federal child labor laws[69] and federal taxation of the net income derived from real and personal property[70] are unconstitutional; that citizens of Japanese ancestry may, without evidence of disloyalty, be forceably relocated during wartime;[71] that constitutional due process reprehends minimum wage and maximum work hour regulation,[72] and statutes condemning "yellow dog" contracts;[73] that restrictions on an employer's right to enjoin strikes[74] and statutory awards of attorneys fees to successful plaintiffs in suits against railroads[75] violate equal protection norms, and that labor boycotts violate the Sherman Act;[76] and that states may not restrict entry into the ice business,[77] or regulate the price of theater tickets,[78] or gasoline.[79]

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Judge Learned Hand

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These decisions and countless others confirm the need for a democratic check upon the policymaking gambits of judges unrestrained by constitutional intent. A President who seeks to shape judicial doctrines through the appointments process should be applauded. By selecting nominees who share his judicial philosophy and legal policy goals, a President makes the course of jurisprudence partially answerable to the voice of the people. And it is the people, not Platonic Guardians issuing ukases from the federal bench, who are the bedrock of the Nation's freedom and liberties. As Judge Learned Hand opined:

> "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."[80]

FOOTNOTES

1. 318 U.S. 332, 347 (1943).

2. 5 U.S. 137, 176-178 (1803).

3. 22 U.S. 1, 188-189 (1824).

4. 9 The Writings of James Madison 191 (G. Hunt ed. 1900-1910).

5. Letter from Jefferson to Wilson C. Nicholas (September 7, 1803), collected in 10 The Works of Thomas Jefferson 10-11 (P. Ford ed. 1904-05) (as quoted in G. Haskins and H. Johnson, History of the Supreme Court of the United States 148 (1981) (Oliver Wendell Holmes Devise).

6. Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283, 478 (1849).

7. S. Rep. No. 21, 42nd Cong., 2d Sess. 2 (1872), reprinted in The Reconstruction Amendments' Debates 571 (A. Avins ed. 1967).

8. Oregon v. Mitchell, 400 U.S. 112 (1970).

9. Federalist No. 78.

10. J. Goebel, Vol. I of Oliver Wendell Holmes Devise: Antecedents and Beginnings to 1801, (1971), pp. 205-206.

11. See H. Abraham, Justices & Presidents (1985), 53.

12. Id., 52.

13. 79 U.S. 287 (1871) (dissenting opinion).

14. See G. White, Earl Warren: A Public Life, (1982), pp. 217-225, 236-241, 263-278; Flast v. Cohen, 392 U.S. 83 (1968); Powell v. McCormack, 395 U.S. 486 (1969).

15. 60 U.S. 393 (1857).

16. 157 U.S. 429 (1895); 158 U.S. 601 (1895).

17. 198 U.S. 45 (1905).

18. 330 U.S. 1 (1947).

19. Even assuming the Fourteenth Amendment intended to incorporate the First Amendment prohibition of federal laws respecting an establishment of religion, the Court's contruction of the stricture has been excessive. See generally R. Cord, Separation of Church and State (1982).

20. Congressional Record 205 at 4, 44th Cong., 1st Sess., 1875, p. 205.

21. 410 U.S. 113 (1973).

22. See note 14, supra, at 359.

23. Democracy in America, 290 (1957).

24. Address of President Roosevelt, broadcast from the White House (March 9, 1937).

25. 10 Stat. 277 (1854).

26. See, e.g., Chicago, Milwaukee & St. Paul Reg. v. Minneapolis, 134 U.S. 418 (1890); Morehead v. New York, 298 U.S. 587 (1936).

27. See, e.g., Adkins v. Children's Hosp., 261 U.S. 525 (1923).

28. See, e.g., Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

29. See, e.g., Adair v. U.S., 203 U.S. 161 (1908).

30. The Age of Roosevelt, The Politics of Upheaval, Vol. 3, 1960, at 447.

31. See note 14, supra.

32. See Wallace v. Jaffrey, 105 S.Ct. 2479 (1985) (Rehnquist, J. dissenting)

33. See, e.g., note 21, supra.; City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

34. See note 21, supra.

35. See note 14, supra, at 152, 185, 248, 354.

36. See 14 Annals of Congress (Gales & Seton ed. 1834), at index columns iii, viii, xxi, 92-676 (1804) (impeachment of Associate Justice Samuel Chase).

37. Ch. IV, 2 Stat 89 (1801) (§§7 and 27).

38. Id., (§1).

39. See Ex parte McCardle, 74 U.S. 506 (1869).

40. 17 F.Cas. 144 (C.C.Md. 1861) (No. 9487).

41. 2 Writings of James Madison 366, as quoted in E. Corwin, Court over Constitution, A Study of Judicial Review as an Instrument of Popular Government, at 23 (1938).

42. Missouri, Kan., & Tex. R.R. v. May, 194 U.S. 267, 270 (1904).

43. Myers v. U.S., 272 U.S. 52, 294-95 (1926) (dissenting opinion).

44. See generally Federal Civil Rights Laws: A Sourcebook, S. Rep. No. 245, 98th Cong., 2d Sess. (1984).

45. Exec. Order No. 9981 (July 26, 1948).

46. Exec. Order No. 11114 (June 22, 1963); Exec. Order No. 11246 (Sept. 24, 1965); Exec. Order No. 11478 (Aug. 8, 1969).

47. P.L. 85-315, 71 Stat. 634.

48. P.L. 86-449, 74 Stat. 86.

49. P.L. 88-352, 78 Stat. 241.

50. P.L. 88-38, 77 Stat. 56.

51. P.L. 89-110, 79 Stat. 437.

52. P.L. 97-205.

53. P.L. 90-202, 81 Stat. 602.

54. P.L. 95-256, 92 Stat. 189.

55. P.L. 90-284, 82 Stat. 73.

56. P.L. 92-318, 86 Stat. 235.

57. The Washington Post, Oct. 20, 1984, at A9.

58. P.L. 98-144 (1984).

59. P.L. 98-411 (1984).

60. P.L. 98-397 (1984).

61. P.L. 98-435 (1984).

62. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

63. Grovey v. Townsend, 295 U.S. 45 (1935).

64. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

65. Civil Rights Cases, 109 U.S. 3 (1883).

66. United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Harris, 106 U.S. 629 (1882).

67. Plessy v. Ferguson, 163 U.S. 537 (1896).

68. Gong Lum v. Rice, 275 U.S. 78 (1927).

69. Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

70. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); 158 U.S. 601 (1895).

71. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

72. Lochner v. New York, 198 U.S. 45 (1925); Morehead v. New York, 298 U.S. 598 (1936); Adkins v. Children's Hosp., 261 U.S. 525 (1923).

73. Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas 236 U.S. 1 (1915).

74. Truax v. Corrigan, 257 U.S. 312 (1921).

75. Gulf, Colo. & San Francisco Ry. v. Ellis, 165 U.S. 150 (1897); Atchison, Topeka & Sante Fe Ry. v. Vosburg, 238 U.S. 56 (1915).

76. Loewe v. Lawlor, 208 U.S. 274 (1908); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); United States v. Brims, 272 U.S. 549 (1926); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n., 274 U.S. 37 (1927).

77. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

78. Tyson & Bro. v. Banton, 273 U.S. 418 (1927).

79. Williams v. Standard Oil Co., 278 U.S. 235 (1929).

80. The Spirit of Liberty, New York, Alfred A. Knopf (1974), at 189-190.

Washington Legal Foundation
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THE WHITE HOUSE

WASHINGTON

September 24, 1985

MEMORANDUM FOR CHARLEY SHEPHERD
PRESIDENTIAL CORRESPONDENCE

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Presidential Get Well Message for Sitting Judge

You have asked if a Presidential "get well" message may be sent to a sitting judge recuperating from surgery. Although the result may seem harsh, I am afraid that no exceptions can be made to the policy of not sending messages of this sort -- or any sort -- to sitting judges.

Thank you for raising this matter with us.

ID# 338417

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: SEPTEMBER 12, 1985

NAME OF CORRESPONDENT: THE HONORABLE BILL EMERSON

SUBJECT: REQUESTS PRESIDENTIAL MESSAGE FOR JUDGE H. KENNETH WANGELIN, POPLAR BLUFF, MISSOURI WHO IS RECOVERING FROM SURGERY

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
M. B. OGLESBY		ORG	85/09/12			
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ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 1240 ____ ____

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*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
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*F-FURNISH FACT SHEET	*S-SUSPENDED	
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
*X-INTERIM REPLY		

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

September 13, 1985

Dear Bill:

Thank you for your September 11 letter requesting that the President send a get-well message to Judge H. Kenneth Wangelin, who is recovering from the removal of a tumor on his lung.

Your interest is appreciated, and please be assured that your letter has been brought to the attention of the appropriate White House office for prompt consideration.

With best wishes,

Sincerely,

M. B. Oglesby, Jr.
Assistant to the President

The Honorable Bill Emerson
House of Representatives
Washington, D.C. 20515

MBO:KRJ:MDB:mdb

cc: w/copy of inc to Anne Higgins -
for further action

WH RECORDS MANAGEMENT HAS RETAINED ORIGINAL INCOMING

338417

BILL EMERSON
MEMBER OF CONGRESS
8TH DISTRICT, MISSOURI

HOUSE COMMITTEE ON AGRICULTURE
HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

SELECT COMMITTEE ON HUNGER

Congress of the United States
House of Representatives
Washington, DC 20515

OFFICES
SUITE 418
CANNON BUILDING
WASHINGTON, DC 20515
202/225-4404

THE FEDERAL BUILDING
339 BROADWAY
CAPE GIRARDEAU, MO 63701
314/335-0101

614 PINE
P.O. BOX 839
ROLLA, MO 65401
314/364-2455

September 11, 1985

Mr. M.B. Oglesby
Assistant to the President
for Legislative Affairs
The White House
Washington, DC 20500

Dear "B":

I respectfully request that the President join me in conveying our personal best wishes to a colleague of mine who is recently recovering from a tumor removal on his lung.

Judge H. Kenneth Wangelin, who is a U.S. Federal District Judge from my district, is making a speedy recovery from this past surgery of a few weeks ago. He, like the President, is in his seventies and is making remarkable progress.

His address is below:

nneth Wangelin

Judge H. Kenneth Wangelin
1325 Meadow Lane
Poplar Bluff, MO 63901

Thank you for any assistance you can give me in this matter.

Sincerely,

Bill

BILL EMERSON
Member of Congress

BE/cs

P.S. Judge Wangelin is a former Republican State Chairman and was appointed to the bench by President Nixon. He is a staunch conservative jurist.

BE.